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CURRENT TOPICS

Into the Limelight

PUBLIC interest in the administration of justice is passing through a boom period. Suggestions on legal matters are coming in thick and fast alike from committees and associations and from correspondence in the Press. An outbreak of juvenile crime in a Wellington suburb has led a New Zealand parliamentary committee to recommend that courts should be empowered to make orders against the parents of delinquent children. Some such power might well be found useful by the juvenile courts of this country, whose members are called upon to discharge one of the most anxious and important of judicial tasks. Visiting the children's sins upon senior generations may not always be a just thing to do, but the community could, we think, rely on magistrates to choose the appropriate case. In any event, it might often be advantageous to be able to compel a parent to co-operate with the court's probation staff in handling an unruly family. Our own Magistrates' Association, in its report for 1954–55, mentioned more extensively below, states that its council has suggested as a point for discussion by a committee whether there should be a right of trial by jury and a right of appeal in young persons' cases. Of more general application is the proposal by a writer to a paper that surprise witnesses (apparently known in some quarters as "springers") should not be allowed to be called by the defence. It is an idea that will not find favour among those imbued with our tradition of weighting the scales in favour of a prisoner. Compulsory defence depositions barely escape the opprobrious epithet "un-English."

The Compensation Fund Again

A THIRD legal topic that has come up recently in the Press concerns the proposed increase in the contribution by solicitors to the statutory compensation fund. This we cannot regard as a suitable matter to ventilate in public debate before a laity unapprised of all the facts. It is well that clients should know there is such a fund (though we can scarcely imagine a solicitor opening an interview with the reminder). Its administration is a matter for regulation within the profession, where the protestations of those who, on no doubt arguable grounds, object to the increased impost and the rejoinders of those who defend it are less likely to be misunderstood as self-interested on the one hand, or unduly smug on the other.

The Magistrates' Association

MEMBERSHIP of the Magistrates' Association, founded in 1920, has steadily risen to 9,742, there having been a net increase of 306 members for the year 1954–55, 825 new members having been in fact enrolled. Recruitment, according to the thirty-fifth annual report of the Association for 1954–55, is of the utmost importance, there being 16,000 to 17,000 active magistrates in England and Wales. Among the interesting items in the report there is a statement of the conclusions of the Council of the Association in reply to the invitation from the Joint Committee of the Bar Council and The Law Society to consider the problem of the conduct of the prosecution's case in the magistrates' courts, with

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reference in particular to cases where the prosecution's case is conducted by a police officer who is also the officer in charge of the case who has sworn the information, or by another police officer, or by the justices' clerk. The Council state: (*a*) The informant should be the person who knows at first-hand the details of the case; (*b*) if the case be not one which the informant can handle, the police should be legally represented; (*c*) the clerk to the justices should take as little part as possible, and preferably none at all, in presenting the prosecution's case. The Council add that they are interested in the system of Procurators Fiscal in use in Scotland, and are obtaining some information thereon to see whether or not a radical change in our present system merits consideration. Another interesting point selected from a large variety in the report is the view of the legal committee that on a variation of maintenance orders it should be possible to take depositions from either the husband or the wife which can be transmitted to the court where the hearing is to take place. The Home Office has, therefore, been asked to consider the possibility of extending to this country the provisions of the Maintenance Orders Act, 1950.

Improvement Grants and Mortgagees

IN articles at 98 SOL. J. 363, and *ante*, p. 85, we have more than once drawn attention to the possibility of prejudice to mortgagees of houses in respect of which an improvement grant under the Housing Act, 1949, is made. A Ministry of Housing and Local Government circular (No. 52/55) to housing authorities makes recommendations which will go some way to meet mortgagees' difficulties. One fear has been that if the mortgagor defaults the mortgagee will, unless the local authority are willing to accept repayment of any outstanding improvement grant, be unable to realise the full value of the asset. The circular therefore expresses the hope that local authorities in these circumstances will consider sympathetically applications for repayment, and if they consider the application should be refused, consult the Minister before finally refusing. The other main difficulty—the possibility that a mortgagor may obtain a grant without notifying his mortgagee—is met by a recommendation that local authorities should take all possible steps to ensure that any applicant for grant has obtained the approval of the mortgagee, and where possible councils should themselves notify the mortgagee that they have received an application for grant.

Damages for Loss of Enjoyment

IT is part of a judge's duty to pronounce an assessment in terms of money of that which has no market price because it is not for sale. Whether it is broken hearts, broken limbs or loss of expectation of life that is in issue the valuation therefor varies from judge to judge. In the Westminster County Court on 26th September, His Honour Judge BLAGDEN awarded £79 damages to a plaintiff who said he had been deprived of the use of his television set for twelve weeks by a company to which he had paid 16s. a month in consideration of a promise to repair and maintain the set for two years. The set went wrong in April, and the company collected it, but they did not return it until July, when it came back damaged and not repaired. It seems from the report of the case that the learned judge valued the enjoyment to be derived at something like £6 a week. It is not clear whether he found that this was its value for every viewer, or whether, notwithstanding that the cost of producing the enjoyment could not approach that figure, the plaintiff's zest for television was such as to justify the award of this compensation for the loss of ecstasy. The former proposition involves the assumption that in television we are getting something for next to nothing, with which few will agree. The latter explanation is more acceptable, viz., that the judge must decide how much when the plaintiff has given his evidence, however difficult that may be (*Chaplin* v. *Hicks* [1911] 2 K.B. 786). We would respectfully submit, however, that where there is a cost of production of the enjoyment and a market value for its perquisites, economics and common-sense concur in regarding these as indispensable guides to the measure of damages for the loss of enjoyment.

Divorce and Probation Officers

MR. C. H. STANLEY, probation officer for Newbury, suggested on 1st October that magistrates should hear the evidence in divorce cases, so that conciliation might be tried before the cases reach the higher court. He said: "Probably because of legal aid—and it may be connected with higher legal fees in the divorce courts—hundreds of couples have been encouraged to seek divorce where in many cases there could have been reconciliation." We have not yet reached the stage when it can confidently be said that no divorce decree is granted before every effort for reconciliation has failed, and there is much to be said for the view that no divorce for desertion at least should be granted unless there is evidence of an attempt at reconciliation. The function of the probation officers in these matters deserves wider scope.

The Elizabeth Fry Memorial Trust

THE third annual report of the Elizabeth Fry Memorial Trust states that the whole trend of official policy towards families in difficulties has undergone a remarkable change in the past few years. The most far-reaching experiments have been initiated by some authorities in measures designed to prevent the break-up of homes. The committee responsible for Spofforth Hall is glad to have played some small part, with other and older organisations, in demonstrating the possibilities of constructive help to families in difficulties. Spofforth Hall was approved by the Home Office in April, 1954, as a home to which mothers convicted of neglecting their children could be sent as a condition of a probation order. At the time of the report all the accommodation at Spofforth Hall was occupied. The report concludes that not only is the work at Spofforth Hall one that calls for continued financial support, but even more, one making very great demands indeed upon the resources, spiritual and physical, of the warden and members of the staff.

The Neglectful Typist

WHEN the typist spells "contractual" as "contractural" or "statutory" as "statuary," lawyers sympathetic with the struggles of the untrained mind with the jargon of a minority understand and forgive. They find it difficult to forgive when, as often happens to-day, whole lines of drafts are left out. Some of the more elderly among us at times sigh for the days when the art of the scrivener was in greater demand, and a conveyance was not considered properly executed unless it was done in Indian ink on parchment. As it is, it is not uncommon for lawyers to have to check a typist's draft three times before daring to pass it. To that extent, it will have been gathered, we agree with Mr. Justice WALLINGTON's statement in the Vacation court last week, on the occasion of discovering omissions from a document. He said: "The idea that there is a duty on us to do our duty properly seems to be declining. If we can do it quickly, so much the better. I am getting tired of it. Things are getting worse and worse. If we could get a habit of doing our work because it is a duty and take pleasure out of doing it properly, there will be a better era dawning."

LICENSING ANOMALIES

THE licensing laws have always been a fertile field for the specialist in legal oddities and anomalies. The assiduous searcher in Paterson, that rich store of licensing information, will come across all sorts of out-of-the-way and intriguing facts. He will learn, for example, that a justices' licence is not required for the sale of spruce or black beer, that a freeman of the Vintners' Company does not need an excise license to sell wine in Lyme Regis or Great Yarmouth, and that to play "puff and dart" for prizes in a public house is unlawful if the players have paid an entrance fee.

He will also be reminded of the celebrated anomaly, to which Sir Alan (then Mr. A. P.) Herbert drew attention in 1934, whereby Members of the House of Commons are exempted from prosecution under the Licensing Acts in respect of sales of liquor within the precincts of the House of Commons. The interested reader will find an account of the test case which Sir Alan brought in the report of *R.* v. *Graham-Campbell and Others; ex parte Herbert* [1935] 1 K.B. 594. He will there learn how "a glass of lager beer and a glass of gin and mixed vermouth" were supplied in a refreshment bar in the House of Commons to Mr. Herbert (as he then was) and a friend, and how Lord Hewart, C.J., together with Swift and Avory, JJ., decided on mandamus that, although there was no licence, the sale of such liquor was a matter which "fell within the scope of the internal affairs of the House and, therefore, within the privileges of the House, so that no court of law had jurisdiction to interfere." The rules were therefore discharged, but the Lord Chief Justice, observing that the case had been "a rare and refreshing diversion," made no order as to costs.

These pleasing sidelights on the licensing law, however, are of little practical interest to those whose task it is to advise licensees on the day-to-day conduct of their premises. We may therefore turn to some other anomalies—not less strange and surprising—that are more frequently encountered by the practitioner and his client.

Section 100 of the Licensing Act, 1953, is from the licensees' standpoint probably the most important section in the Act. It deals with the permitted hours for the sale and consumption of liquor, and by subs. (1) it forbids such sale and consumption on licensed premises outside such hours. Subsection (2), however, introduces certain modifications of this prohibition, and enacts, *inter alia*, that "nothing in the preceding subsection shall prohibit or restrict the ordering of intoxicating liquor to be consumed off the premises, or the dispatch by the vendor of liquor so ordered." The casual reader on his first encounter with the section may feel that this is all clear enough. A licensee can take an order from a customer for a bottle of wine for off-consumption outside the permitted hours, and can send his errand boy forthwith to take the wine to the buyer's house. But he must not, of course, sell a bottle of wine over the counter for the buyer to take away himself. The casual reader will, however, discover on closer inspection that this simple view of the position is a mistaken one. As the law now stands the wine merchant, having taken his customer's order (perhaps on the telephone), must not appropriate any particular bottle to it until the next ensuing permitted hours. If he makes an appropriation during prohibited hours he will turn the transaction into a complete sale, and we have the authority of the High Court of Justiciary in Scotland that the words of the subsection do not apply to completed sales (*Sinclair* v. *Beattie* [1934] S.L.T. 40). The casual reader, however, need not feel too depressed about his misconstruction of the subsection. He erred in good company. The Lord Justice-General in *Sinclair's* case took the same view. "I do not believe," he said in his dissenting judgment, "that the Act of 1921" (the wording of which is repeated in the Act of 1953) "was intended to prevent a wine merchant from accepting in his licensed premises a customer's order for a bottle or bottles of wine given outwith the permitted hours . . . or from dispatching the wine so ordered to his customer's house outwith those hours." He went on to say that, if the decision in *Valentine* v. *Bell* [1930] S.C. (J.) 51, which was relied upon by the prosecution, prohibited "the mere making of an executory contract of sale in licensed premises outwith permitted hours or the dispatch of the goods so contracted to be sold from the premises to the customer's house," he would dissent from it, but he did not think that *Valentine's* case could be so read. Nevertheless, the other members of the court considered that the case before them was indistinguishable from *Valentine's*, and concluded that, in the words of Lord Morison, the section "imports a universal prohibition of the sale or supply of liquor on licensed premises during the prohibited hours."

Valentine's case was quoted and approved in the English case *Mizen* v. *Old Florida, Ltd.; Egan* v. *Mizen* (1934), 50 T.L.R. 349, and its facts are perhaps worth attention. Mr. Valentine, a grocer who held a certificate (in England it would be called a licence) for the sale of excisable liquor, was visited outside permitted hours by a Mrs. Hamilton, who asked for half a bottle of wine, and handed over an empty bottle. Mr. Valentine filled it, wrapped it up and handed the parcel to an errand boy to deliver at Mrs. Hamilton's house. Mrs. Hamilton and the errand boy left the shop together, but when they were only a short distance from the shop the boy handed the parcel directly over to Mrs. Hamilton. The "delivery," in other words, was something of a legal fiction. The Court of Justiciary held that, quite apart from the deceptive nature of the delivery, this was a sale forbidden by s. 4 of the Licensing Act, 1921 (now s. 100 (1) of the Act of 1953). With reference to the contention that the transaction was protected by s. 5 of the Act of 1921 (now subs. (2) of s. 100), Lord Alness observed that it would be absurd in one section to prohibit the sale and in the next section to permit it. The conclusion of the matter, he went on to declare, was that sale outside the permitted hours is prohibited, but that ordering within the prohibited hours is permitted. This, it seems, is the law of the land—and there is, of course, a completed sale as soon as appropriation takes place, for "a contract to sell unascertained goods is not a completed sale, but a promise to sell" (*per* Lord Loreburn, *Badische Anilin und Soda Fabrik* v. *Hickson* [1906] A.C. 419).

It would be presumptuous to question the correctness of these decisions, but the anomalous position which results from them is well demonstrated by an examination of what happens in practice. The wine merchant or publican may accept an order from a customer for a bottle of claret during prohibited hours. But as soon as he takes a bottle from his rack, saying, "This claret is for Mr. Smith," he makes the sale complete, and if he performs the action during the prohibited hours he commits an offence. Appropriations, in short, must wait until permitted hours come round. It is perhaps legitimate to guess that in the privacy of their own premises a good many licensees habitually ignore this construction of the section and make their appropriations whenever it is convenient to do so, thus committing a succession of highly technical and virtually undetectable offences.

Another surprising situation arises sometimes in practice from the provisions of s. 122 of the Act of 1953. Suppose a customer on licensed premises buys a dozen bottles of beer one evening, intending to take them on a picnic next day. He asks the licensee to put them aside for him. The next morning, before the commencement of permitted hours, he calls in his car at the premises to collect his beer. He may not, of course, go into the premises and carry the beer out to his car. That would be an infringement of s. 100 (1) (*b*) of the Act, which forbids a person to take from any licensed premises any intoxicating liquor during prohibited hours. Can the licensee then help by carrying the beer out to his customer's car on the highway? Perhaps, but he must be careful how he does so. Otherwise he may find himself in breach of s. 122, which declares that "a person shall not in pursuance of a sale by him of intoxicating liquor deliver that liquor . . . from any . . . barrow, basket or other . . . receptacle unless" he has made certain entries in a day book and delivery book (or invoice) beforehand, including an entry of the name and address of the person to whom the liquor is to be supplied. If the licensee proposes to convey the beer to his customer's car in a crate or basket it would seem, therefore, that he must first make the necessary book entries. Nor is this all. He must also not deliver in pursuance of a sale by him any intoxicating liquor at any address not entered in the day book and delivery book (or invoice). The customer's car can hardly be regarded as his "address," and it seems indeed as if the section really only contemplates delivery to a house. The licensee wishing to deliver to a car would thus be in some difficulty over entering up his books correctly. In practice, he would probably feel that his best way out of the difficulty would be to ask his customer to come back again after the opening of permitted hours.

A third curiosity is observable in connection with s. 132, which forbids the giving of credit in respect of sales for on-consumption. "A person," it says, "shall not . . . consume intoxicating liquor on any (licensed) premises unless it is paid for before or at the time when it is sold or supplied." This provision is generally well known—and equally well known are the provisions of s. 100 (2) (*e*), which allow a licensee to entertain his "private friends" at his own expense after hours. But it nevertheless seems that private friends of the licensee when they consume—whether during or after hours—the drinks which he has so generously stood them will at least be in danger of infringing s. 132, since the liquor which they are swallowing will normally not be paid for before or at the time when it is supplied. Indeed, it will probably not be "paid for" in the ordinary sense at all, since the licensee is giving it away and not selling it. While, therefore, the acceptance by a customer on licensed premises of a drink "on the house" certainly seems to be envisaged by s. 100, one cannot help observing that the wording of s. 132 is quite wide enough to forbid it.

We have considered three of the oddities that lurk in the Licensing Act—two of them awaiting consideration by the courts and the other arising out of a surprising though doubtless correct interpretation of the statute. Space forbids a discussion of other anomalies in this branch of the law, though others there are. Their presence is no doubt to be ascribed to the attempt made by the Legislature in the Licensing Acts strictly to control every department of a many-sided branch of human activity. Nor is the law of licensing likely to grow any less rich in such peculiarities until its rigidity is relaxed by Parliamentary action—an eventuality that even the most hopeful advocate of the freedom of the drinking public must still regard as remote.

M. U.

SLUM CLEARANCE AND HOUSE PURCHASE

A GOOD deal of publicity has been given, in newspapers and elsewhere, to the recent request of the Minister of Housing and Local Government in circular 54/55 that local authorities endeavour to protect the public from ill-advised purchases of old houses likely to be included in slum clearance schemes. The Minister wishes that authorities should give warning that they are preparing a comprehensive programme of slum clearance and should advise those who are proposing to buy old houses to make inquiries at the council offices "in order to ascertain whether they will be affected by the slum clearance programme." The Minister recognises that it may be difficult to give a definite answer, for instance if the house is in an area whose future is not determined.

Such warnings may do much good, particularly as a man in urgent need of a house may be tempted to take an undue risk. Nevertheless, it would be wrong to assume that there can be any simple and firm rule to determine whether a house may be bought with safety. It is broadly true to say that the substantial danger is that a house may be determined to be "unfit for human habitation" within the meaning now given to those words by the Housing Repairs and Rents Act, 1954. This Act required local authorities to submit to the Minister proposals for dealing with such houses. The Minister has been content, however, with a return specifying the numbers of such houses, the period of years which the council think necessary for securing their demolition and particulars of the action proposed in the first five years. The local authority were not required to specify the particular houses. Three important conclusions can be drawn. In the first place the local authority may not be able (in the absence of a detailed survey that may not be possible in the time available) to state whether a particular house is, in their opinion, unfit. Secondly, the view of the local authority is not conclusive; an appeal against an order of the authority may lie to the county court or the relevant order may require confirmation of the Minister. Thirdly, the position may be very different in a few years' time. Much old property is deteriorating rapidly and many houses not included in the totals submitted to the Minister may be regarded as unfit in another five or ten years.

The protection of a prospective purchaser is, therefore, no easy matter. Demolition orders and clearance orders, when effective, are registrable as local land charges, but the problem is to anticipate whether such an order is likely to be made in the next few years. Use of one of the standard forms of additional inquiries to accompany local searches might result in the disclosure of a notice served by the authority as a step towards the making of an order affecting the house, but this would not help to ascertain probable action a few years ahead.

Clearly it is impossible even for the local authority themselves to state with certainty what may happen in, say, ten years' time. Nevertheless, an informal inquiry of the local authority whether they can forecast the future of a house may provide a very useful guide. Yet, ultimately, the problem in many cases will be one of valuation in which a surveyor or estate agent familiar with the district is the person best able to

advise. He will be able to express a view whether the house is, or is likely to become, unfit; he will probably have a good idea of the speed at which the authority's programme will progress, and, finally, he may be able to give some indication of the compensation (if any) likely to be payable if action is taken by the local authority. However one may regret it, one must conclude that the advice most needful to a prospective purchaser of an old house must often be expert advice such as is not always available to a man of modest means, and, in fact, is rarely sought by him.

THE YEAR'S PROCEDURE CASES—IV: A MISCELLANY

In the past three articles of this little series we have chosen for discussion those practice cases reported during the legal year which seemed to us to offer the most useful material for talking points. Not all of them, possibly, were so intrinsically important as some that we have so far left out. For the sake of completeness, therefore, we will attempt a sweeping-up operation, and to camouflage the catalogue as much as possible we will adopt a chronological order roughly corresponding to the sequence of litigation.

What relief is to be claimed? That is a question to be decided before we prepare our writ or originating summons, lest the court should say, as it did in *Green* v. *Hertzog and Others* [1954] 1 W.L.R. 1309; 98 Sol. J. 733, that the action was misconceived. A partner sued other partners in a common-law claim for money lent. But the loan was made by one partner to the partnership, not to the defendants personally. The liability of partners is joint. There must be a taking of accounts, and any actions would have to be brought, as Lord Goddard, C.J., said, in the proper division on proper pleadings asking for a proper order in a partnership action. The common-law claim failed.

The time-saving virtues of the procedure available in the Commercial Court, as elsewhere, by way of a claim for a declaration were canvassed by McNair, J., at the end of his judgment in *I. H. Vantol, Ltd.* v. *Fairclough, Dodd & Jones, Ltd.* [1955] 1 W.L.R. 642; *ante*, p. 386. The parties had fallen out early in 1951 over the construction, in the events that happened, of a contract between them. They went to an umpire and then to the appeals committee of the trade association whose standard form of agreement they had adopted. The committee made an award subject to the decision of the court on a point of law set out in a special case, on which McNair, J., gave judgment in May, 1955. His lordship commented that if the parties had been minded to make use of the machinery of the court in January or February of 1951 the whole matter could have been disposed of in two or three months. A declaratory judgment as to the effect of the contract could have been given even while the contract was still running.

We published an article at p. 446, *ante*, on *Entores, Ltd.* v. *Miles Far East Corporation* [1955] 3 W.L.R. 48; *ante*, p. 384. The theoretical point there affirmed was that, where communication between offeror and offeree was instantaneous, a completed contract did not result until the offeror knew of the acceptance of his offer: the translation of that proposition into the terms of the dispute between the parties amounted to a finding that the contract was one made at the place where the acceptance was received; which in turn meant that the contract was one made within the jurisdiction so that the plaintiffs had rightly been given leave under R.S.C., Ord. 11, r. 1 (*e*), to serve notice of their writ out of the jurisdiction. Thus is adjectival law intertwined with the substantive. Somewhat similarly the decision of Danckwerts, J., in *Rousou's Trustee* v. *Rousou* [1955] 1 W.L.R. 545; *ante*, p. 337, to allow service of a writ in Cyprus (the diplomatic expedient of serving notice of a writ is not applicable within Her Majesty's colonies) was based on the view which his lordship took that the right founded on by the plaintiff was of a contractual nature.

A defendant who regards the proceedings brought against him as not merely contestable on the merits, but as also incompetent for some jurisdictional reason, is not bound, as we illustrated in our last article, to await the trial before asking for his objection to be decided. One of the courses open to him is to apply by summons for the proceedings to be stayed. The court has an inherent power to order a stay in addition to the specific powers conferred by Ord. 25, r. 4, and by certain other rules applicable in special cases. The judgments of the Court of Appeal in *Martell* v. *Consett Iron Co., Ltd.* [1955] 2 W.L.R. 463; *ante*, p. 148, are principally to the effect that the ground of the defendant company's application for a stay in that case, namely, that the action was being illegally maintained by a third party, was not on a proper reading of the facts and law made out. But the members of the court seem to have been agreed on a further point. An application to stay proceedings is not a desirable occasion on which to try the question of illegal maintenance, for maintenance is no defence to the action. Which amounts to saying that an application for a stay is misconceived in such circumstances, even if there should be incontrovertible evidence of financial backing by a person who has no interest in the issue sought to be litigated.

With regard to the Privy Council case of *United Africa Co., Ltd.* v. *Saka Owoade* [1955] 2 W.L.R. 13; *ante*, p. 26, we need only say here that it gave the Judicial Committee an opportunity of reiterating that the proper function of pleadings is to state facts and not contentions of law. *Ward* v. *Lewis* [1955] 1 W.L.R. 9; *ante*, p. 27, enshrines more detailed guidance on the same subject. When conspiracy is alleged the fact of damage must always be pleaded, for damage is an essential ingredient of this tort. Further, there must be a connection between the alleged acts of the defendant and the damage complained of, and the facts relied on as establishing that nexus must also be pleaded. Then the next case in the same volume, *Re Reynolds, deceased; Pearkes* v. *Reynolds* [1955] 1 W.L.R. 12; *ante*, p. 27, dealing with Ord. 19, r. 25A, which requires an especial particularity in pleadings in probate actions where it is alleged that the testator was not of sound mind, memory and understanding, shows that there is a limit to be set on the minuteness of the detail which the court will require under that rule. It also warns us that there is a limit to the patience of the modern bench in the face of the delay and expense caused by too avid a thirst for particulars.

Of the interlocutory stages after pleading, discovery has been the most fruitful of recent decisions. *Iwi* v. *Montesole, The Times*, 8th and 15th March, 1955, and *Broome* v. *Broome* [1955] 2 W.L.R. 401; *ante*, p. 114, concern the important doctrine of Crown privilege against the disclosure of certain official documents and of secondary evidence of their contents. Another form of privilege, which belongs to the parties, protects documents compiled on legal advice for the purpose of pending proceedings, and this extends to medical reports. The master cannot therefore *order* the exchange of medical reports even under his new power of robustly controlling the

action (*Worrall* v. *Reich* [1955] 2 W.L.R. 338; *ante*, p. 109; see also a Current Topic at p. 173, *ante*). On the other hand, the privilege we have mentioned is not available to the doctor-witness if he is subsequently sued in a distinct action for libel arising out of what he is alleged to have written in a medical report so prepared (*Schneider* v. *Leigh* [1955] 2 W.L.R. 904; *ante*, p. 276).

Discovery leads to inspection of documents, but there are other kinds of inspection. When a court adjourns to view the *locus in quo* it usually causes (we have never understood why) a Press sensation. At all events the legal advisers of the parties and their experts can often profit by looking for themselves at any property, real or personal, to which the dispute relates. *Penfold* v. *Pearlberg* [1955] 3 All E.R. 120 indicates that where land or a building is itself the *subject of the action* the court may by order facilitate an inspection of it even though it is not in the possession of one of the parties (see also p. 585, *ante*).

The judgment of Slade, J., in *Green* v. *Rozen and Others* [1955] 1 W.L.R. 741; *ante*, p. 473, is exceptionally valuable for its summary (too long to set out here) of five informal methods of disposing of an action when terms of settlement are arrived at immediately before the trial or during its course. His lordship felt reluctantly compelled to refuse to enter judgment for the unpaid balance of a sum due by instalments under a settlement announced six months earlier in court, the terms being indorsed on counsel's briefs, because no order of the court had been made when the compromise was reached. The plaintiff's remedy was by a new action on the compromise agreement.

For a jury to disagree in a civil action is, as Ormerod, J., observes, comparatively rare in these days. This had happened, however, in the slander action of *Davidson* v. *Rodwell* [1955] 1 W.L.R. 654; *ante*, p. 386, which was before that learned judge pursuant to liberty to apply given after the trial. The question was as to the procedure for re-entry of the case for trial and the payment of a further fee on setting down. His lordship held that a fresh fee was payable in the circumstances (though re-entry of adjourned, postponed or transferred cases is apparently free of charge) and that the plaintiff should have twenty-one days to set down, with a sort of "remainder over" for the defendant to do likewise.

Finally to matters of execution and enforcement. *Watson* v. *Murray & Co.* [1955] 2 W.L.R. 349; *ante*, p. 112, was described in an article at p. 266, *ante*; *Re Klingelhofer's Will Trusts*, *The Times*, 19th March, 1955, in another at p. 391. The former deals with the procedure of a sheriff's officer acting under a writ of *fi. fa.*, the latter with the writ of assistance. It was left to our contemporary the *Law Journal* to publicise an interesting decision from the county court which appears to unsettle the practice which had grown up of registering writs of *elegit* under the Land Charges Act, 1925, instead of proceeding to have them extended by delivery to the sheriff. Thereby, it was thought, an equitable charge on the land was brought into being, sufficiently notified to all the world, and the judgment creditor was enabled to sit back and wait to be paid off when the land came to be sold. But Judge Sir Donald Hurst held in *Re Smith and the Halifax Building Society* (1955), 105 L.J. 124, that a writ of *elegit* was a nullity until perfected by the inquisition of the sheriff. Being worth naught, it could not be made worth something by registration. The case had one perhaps unusual feature which may have made it an unsuitable one for testing the main ground of the judgment in a higher court. The writ was not in fact registered until after the mortgagees of the property in question had entered into a binding contract to sell it under their power of sale. So that the interest of the judgment debtor at the time of the registration of the writ was simply a barren legal estate supplemented by a right to be paid any surplus from the proceeds of sale. An authority cited by His Honour, *Stevens* v. *Hutchinson* [1953] Ch. 299, emphasises that it is only upon an interest in land, not in its proceeds of sale, that a judgment creditor can obtain a charge under the provisions of s. 195 of the Law of Property Act, 1925.

J. F. J.

HEADS I WIN . . .

THE report of *Eagle Star Insurance Co., Ltd.* v. *Gale & Power*, which appears in (1955), 166 Estates Gazette 37, underlines a practical difficulty which may arise out of an everyday transaction. The decision reached, although no doubt fully supportable by reference to legal doctrines of privity of contract and the measure of damages, is an example of one of those unfortunate cases where the common law has not been able to evolve a remedy for an obviously unsatisfactory situation.

A claim had been made by the Eagle Star Insurance Company against a firm of surveyors for damages for breach of contract for the valuation of a house. The breach of contract was admitted but the defendants denied that they were liable for any damages.

The plaintiffs had employed the defendants to survey a house which a Mr. Curtis wished to buy with the assistance of a mortgage from the plaintiffs. The defendants reported that £3,350 was a fair valuation, and that the house did not need any immediate repairs. The plaintiffs gave Mr. Curtis a 90 per cent. loan secured on a mortgage of the house and the personal covenants of Mr. and Mrs. Curtis. Mr. Curtis undertook to pay off £1,500 out of a retirement gratuity he would receive in 1956.

The house was in fact in bad condition and worth only about £1,600. The defendants had failed to notice a settlement, fractures in the walls, and a bulge in one wall. The defendants, while admitting that they were in breach of contract, claimed that the plaintiffs were not entitled to any damages because, as they put it, the mortgage of the house was only a collateral security. They contended that in assessing damages one had to consider what the plaintiffs would get out of the transaction with Mr. Curtis if it ran its normal course. It was evident that Mr. Curtis intended to fulfil his obligations to the plaintiffs, so that the probability of their sustaining actual damage was remote. On the other hand, the plaintiffs claimed that they were at least entitled to damages to enable them to restore the house to the state which was wrongly reported to them by the defendants. Any damages they might recover would be used in carrying out repairs or in reducing the mortgage.

The argument of the defendants largely prevailed with Devlin, J., who held that the transaction must be looked at as a whole to see what loss the plaintiffs had sustained. In view of the covenant to repay £1,500 and the personal covenants, it was unlikely that the plaintiffs would lose any part of their money. Nevertheless the learned judge did not think it a case for nominal damages and awarded the plaintiffs £100 to indemnify them against the possibility of their not being able to recover their money from Mr. Curtis. In the course of his judgment, Devlin, J., is reported as saying: "I cannot help feeling that this is a situation that need not have arisen at all. If building societies and insurance

companies were to make arrangements for their clients to have the benefit of the surveyor's report, for which the clients have to pay, the clients would then have a right of action against the surveyor. It is a situation which is a trap, though innocently set, which makes people think that in paying for the surveyor's report they can rely on it in law. It is distressing to see people who have invested all their savings in their homes being treated in this way. This is the second case of this type I have dealt with in the past two years and I feel that there must be many more cases where this sort of hardship goes without remedy."

At first sight it is not altogether easy to see how his lordship's suggestion that building societies and insurance companies should make arrangements for their clients to have the benefit of the surveyor's report can be implemented without introducing complications into the comparatively simple task of instructing surveyors. Since *Candler* v. *Crane, Christmas & Co.* [1951] 1 T.L.R. 371, it is clear that, short of a contrary decision by the House of Lords, in a situation such as arose in the *Eagle Star* case surveyors owe no duty of care to the unfortunate purchaser/mortgagor. There being no contract or fiduciary relationship between them, the purchaser has no cause of action in contract or in tort against the surveyor. Even if the building society or insurance company showed the report to the client and he acted upon it, he would be no better off. Nor, it seems, on the authority of *Candler* v. *Crane, Christmas & Co.*, would the purchaser's position be improved if the surveyor were expressly told at the outset that his report was to be made available to the purchaser.

The *Eagle Star* case also suggests that the surveyor's report may not be quite so effective a protection for the lender as was generally supposed. It now seems that in cases where the house has been over-valued and defects have passed unnoticed through the negligence of the surveyor, the lender must go to all the trouble of realising his security and pursuing his other remedies under the mortgage before he can quantify his loss sufficiently to recover any worthwhile sum from the negligent surveyor. It is certainly unfortunate that the mortgagee cannot recover forthwith sufficient to carry out the work necessary to bring the house up to the standard reported by the surveyor.

Lord Wright has written: "Great judges have said that the function of the common law was the perpetual quest for justice" (66 L.Q.R. 456). If a negligent surveyor can escape the consequences of his negligence by avoiding liability to the purchaser/mortgagor on the ground of lack of privity of contract, and by limiting his liability to the mortgagee, with whom there is privity of contract, to the full extent of the probably limited resources, and maybe life savings, of the mortgagor, then it would seem that in at least one respect the common law has not reached the end of its quest.

Before suggesting a possible solution to the problem under discussion, it is as well to consider whether, so far as a lender is concerned, there is any obligation on him to employ an independent surveyor. Insurance companies and private individuals are quite free to make whatever arrangements they please for valuation. Similarly, banks and other financial institutions are unrestricted. A building society need not actually employ the surveyor, or solely employ him, provided that the arrangements made for assessing the adequacy of the security are such as may reasonably be expected to ensure that the adequacy of the security will be assessed by a competent and prudent person experienced in matters relevant to the determination of the value of the security (Building Societies Act, 1939, s. 12). Trustees are in a much more restricted position when it comes to lending trust money on mortgage. For by s. 8 of the Trustee Act, 1925, trustees will only secure the benefit of that Act if, in making the loan, they were acting upon a report as to the value of the property made by a person whom they reasonably believed to be an able practical surveyor or valuer employed independently of any owner of the property.

The position would seem to be capable of improvement from the point of view of both parties to the mortgage if either (*a*) the surveyor was instructed jointly by both borrower and lender, (*b*) the borrower instructed a surveyor nominated by the lender, or (*c*) the lender instructed the surveyor, as agent for the borrower.

In all three cases the incidence of the fee would still fall on the borrower as at present, except that he would pay it direct to the surveyor rather than through the lender. Any necessary report form required by some lenders could still be provided by them as at present. There could also be a collateral contract between the lender and the borrower excluding any implied warranties as to reasonableness of price or fitness of the security.

Of the three courses suggested, the first would seem to be the most satisfactory as it would ensure privity of contract between both parties to the mortgage and the surveyor. It might also be possible for trustees to adopt this course in the case of a purchaser/mortgagor as, at the time the instructions were given and the survey made, the owner of the property would not be the applicant for the loan. In the two last-named cases there would be no privity of contract between the mortgagee and the surveyor; this reason would also make these courses unsuitable for trustees. It is considered that privity of contract between the lender and the surveyor is most desirable in order to provide for those cases (and they are doubtless the majority) where, apart from the equity in the house, the personal covenant is of little substance.

Some difficulty might arise over the question of fees. The average purchaser of a house is reluctant to pay the relatively high scale of fees asked by surveyors from the general public. A reduced scale is charged for surveys for building societies and similar mortgagees. It would therefore be necessary for arrangements to be made for the lower scale to apply to instructions given in connection with a building society or similar mortgage, whether the instructions were given jointly by the lender and borrower or by the borrower alone.

H. N. B.

EVIDENCE OF A WITNESS ABROAD—II

It is now proposed to consider the two main points arising from the recent decision in *Sinatra* v. *Mills, Gourlay and London Express Newspaper Ltd.* (*The Times*, 16th March, 1955) which has already been discussed (*ante*, p. 671). These are as follows:—

(1) *The attendance of the witness at the trial*

It was stated by Jessel, M.R., in *Warner* v. *Mosses* (1880), 16 Ch. D. 100, in referring to an application to examine witnesses under the predecessor of Ord. 37, r. 5 (then r. 4): "That is general in its terms, but in regard to the provisions of an Act of Parliament one must recollect what the practice was it was intended to meet. I do not intend to cut down the generality of its terms, but it is confined to cases in which it appears 'necessary for the purposes of justice.' Now it cannot be necessary for the purposes of justice to examine witnesses before the trial who can attend at the trial, and

accordingly this rule of the order has been used in the cases . . . where witnesses are going abroad, or who from age or illness or other infirmity are likely to be unable to attend the trial, and then they are examined *de bene esse* in the usual way; but to have such an order you must have evidence that the witness cannot attend the trial. I do not wish to confine the effect of this rule to the cases I have mentioned. It does extend, no doubt, as it says, to all cases where it shall appear 'necessary for the purposes of justice'." Inasmuch therefore as it cannot be necessary to examine witnesses before the trial who can attend at the trial, the cases show that the courts require strong evidence of the inability of the proposed witness to attend at the trial before an order will be made for his examination. Thus, in *Lawson* v. *Vacuum Brake Co.* (1884), 27 Ch. D. 137, it was sought by the plaintiff to examine abroad a certain witness the materiality of whose evidence was not seriously disputed. In support of the application, an affidavit by a clerk of the plaintiff's solicitors stated that (*inter alia*) the witness was an American citizen, and was residing in Chicago, and a second affidavit stated that he was employed in a certain company in Chicago, and the deponent then swore that he believed that the witness could not come over to England to attend and give evidence on the trial of the action, and that he was able to make the foregoing statements from knowledge derived from letters written by the plaintiff from America to his principals. The application was refused by Bacon, V.-C., and in dismissing an appeal by the plaintiff Bagallay, L.J., after stating, with reference to the second affidavit above mentioned, that anything more vague than that testimony one could hardly imagine, and that the court had no affidavit from the witness and no evidence from the plaintiff himself, says: "All we have to rely upon is the affidavit of the clerk of the solicitors in England as to the information received and derived from letters. In my opinion such evidence is insufficient." And in agreeing, Cotton, L.J., says: "In my opinion, there is not sufficient evidence to satisfy me that this witness cannot be brought here, or will not come here. It is true we are told he is in the service of some company, but we do not know what is the character of his occupation, or whether he would not be able at comparatively small expense to leave for a time his position there and come over to this country."

(2) *That in a jury case the witness ought to be heard and seen by the jury*

There may also be certain special reasons why it is not consistent with the due administration of justice that a particular witness should be examined abroad, the interests of justice in such a case requiring his attendance in court in this country. This position was recognised in *Armour* v. *Walker* (1883), 25 Ch. D. 673, where an application was made by the plaintiffs in an action to recover the payment of one moiety of the loss incurred under a partnership agreement for the examination in New York, and elsewhere in America, of (in addition to the plaintiffs) certain witnesses as to facts, and also of certain American lawyers as to the law of limited partnership. This application was granted by Chitty, J., sitting in chambers, and his order was confirmed on appeal, subject to the qualification (*inter alia*) that the commission should be executed in New York. In his judgment Cotton, L.J., says: "In my opinion, an order for a commission to examine witnesses abroad ought not to be made unless some reason is shown why they cannot be examined here, nor unless the court is also satisfied that there are material witnesses abroad whom the party wishes to examine. It should not be a mere roving commission to give the party a chance of finding evidence abroad. I think that in the present case it is shown that there are material witnesses who cannot be expected to come here unless there is some special reason why their examination should take place in this country." In agreeing, Lindley, L.J., says: "I think that all that is required to justify the issuing of the commission is that it should be shown that there are witnesses resident in America whose evidence is material, unless a case is made out why they should be examined here. There may be special cases where it is necessary for the purposes of justice that the examination should take place here, but no such special case is made out on the present occasion."

This judgment therefore proceeds upon the assumption that there may be special cases where it is necessary for the purposes of justice that the examination should take place in this country. An example is to be found in the *Lawson* v. *Vacuum Brake Co.* case, where the witness whom the plaintiff sought to examine in Chicago was a witness who had been a party to certain transactions which the plaintiff was seeking to impeach upon the ground of fraud, the witness having since become friendly to the plaintiff, and being then willing to turn approver and to give evidence against those whom he alleged to be his associates in the fraud (see this case as explained by Wills, J., in *Coch* v. *Allcock* (1888), 21 Q.B.D. 1). Bagallay, L.J., says this, after the passage from his judgment already set out: "But there is a further point to be considered. We cannot shut our eyes to the peculiar position of this witness in relation to the parties to the action. According to the statement of claim, he originally took an active part in the transaction impeached as fraudulent, and he has now become a partisan of the party who is seeking to set aside that transaction, and he comes forward to give evidence against his own accomplice in the fraud. Now I can hardly conceive a case in which it is more essential that the testimony of the witness should be given in court at the trial, where he would be subjected to cross-examination. As has been observed in one of the cases, you cannot, by giving instructions to persons in America to cross-examine in America, provide for making the cross-examination as effective as if it took place in the presence of persons fully acquainted with all the circumstances of the case. If to avoid this disadvantage you send over the solicitors and counsel of the parties to America you incur an enormous expense. Not only does it appear not necessary 'for the purposes of justice' that this person should be examined in Chicago, but it would appear that the purposes of justice would very likely be defeated by his being examined elsewhere than in England." In the same case, Cotton, L.J., says: "This is not the case of a plaintiff but of a witness, and undoubtedly a most material witness—a witness who is coming to give evidence on the part of the plaintiff to assist the plaintiff in upsetting for fraud a scheme in which the witness had himself been one of the principal actors. It is most desirable that such a witness should be examined in open court. If, however, it could be shown that he could not be induced to come here, or that the plaintiff could not reasonably be expected to bring him here, I think it would be right to give leave to examine him abroad, and it would be for the court or the jury at the trial to determine how far the weight of his evidence was affected by their not having seen or heard him. But I think that in a case of this sort, where it is important that the witness should be examined in court, a heavy burden lies on the party who wishes to examine him abroad, to show clearly that he cannot be reasonably expected to come here. On that point the plaintiff has failed." In agreeing, Lindley, L.J., says: "Now having looked at the pleadings I am not prepared to say that it is 'for the purposes of justice' that all the expense and delay of going out to

Chicago should be incurred. On the contrary, I think the purposes of justice will be best answered by leaving the witness to come over if he likes and stay away if he likes. In other words, the plaintiff's case is apparently of that shadowy, frivolous and vexatious character that I think it would not be 'for the purposes of justice' that we should make this order."

It would appear from these judgments that there is a difference of view as regards the action to be taken where it is considered by the court to be essential that in the interests of justice a particular witness should be examined in court. Thus it appears to be the view of Bagallay, L.J., that in such a case the party seeking to call the witness must be deprived of the benefit of his evidence, if the witness does not come over to this country, and Lindley, L.J., supports this view; on the other hand, Cotton, L.J., clearly expresses the view that in such a case it would be right to give leave to examine the witness abroad, it being for the court or the jury at the trial to determine how far the weight of his evidence was affected by their not having seen or heard him. There does not appear to be any reported case in which this issue was the sole one before the court, for in this case, as has been seen, no member of the court was satisfied that the witness could not have been brought over here, or would not come over here. It is conceived, however, that in a case where this is the sole issue, and where the interests of justice demand that the witness should give his evidence only in court here, an order for his examination abroad will be refused. Such a case, however, it is conceived, would only arise where the evidence of the witness is not only material, but also essential, and where the circumstances which require his presence in court are exceptional, such as those indicated in *Lawson's* case, and also where there is evidence that the witness is avoiding being cross-examined in court. This was the case of the plaintiff in *Berdan* v. *Greenwood* (1880), 20 Ch. D. 764*n*, referred to at 98 SOL. J. 676, where the court refused an order for his examination upon the ground that they were satisfied that the reason given for the plaintiff's not coming over here to give evidence in court was a pretence, and was only brought forward to enable him to avoid being cross-examined in court. There, however, both Bagallay, L.J., and Cotton, L.J., stated that they were of opinion that the plaintiff had not made out that he could not come over without serious risk to himself, and Bagallay, L.J., expressed the view that the plaintiff's case ought not to depend simply and solely on the evidence of that one witness, namely, the plaintiff. That learned lord justice did, however, go on to say that he thought that, even in the extreme case where the refusal of a commission might prevent the evidence of the witness from being given at all, yet, if the court was satisfied that the non-attendance of the witness before the tribunal which had to decide the case would lead to injustice to the defendant, the commission ought still to be refused.

Although, as has been seen, there is a difference in the exercise of discretion by the court on an application for an order for examination depending upon whether the person sought to be examined is the plaintiff or a mere witness, there would appear to be no reason why in a proper case an order for the examination of a witness should not be refused upon the same grounds. A similar position might also arise should there be any question as to the identity of the witness (cf. *Nadin* v. *Bassett* (1883), 25 Ch. D. 21, where, the identity of the plaintiff being questioned, an order for his examination abroad was made subject to the qualification that, if the defendant required him to appear at the trial to be examined and cross-examined, the depositions were not to be read).

But the courts have been slow in refusing an order where the witness was not able to come over here. Thus, in *Langen* v. *Tate* (1883), 24 Ch. D. 522, the plaintiff claimed the rectification of a solemn deed conferring an exclusive licence to use certain patents in England upon the defendant, so as to make it consistent with what he alleged to have been the common intention of the parties when it was executed. In order to prove what was the intention of the parties, he sought an order for the examination in America of a witness who was to a certain extent interested in the action, because it was alleged that the result of the deed, as it stood, was to prevent the witness from importing into England certain products made abroad according to the patents which he held, he being the licensee for the use of the products in America, although there was no allegation in the pleadings, nor did it appear in evidence, that the witness had taken part in the negotiations. Chitty, J., refused the order, being of opinion that it was of the highest importance that, when the trial came on, the witness should appear in person, so that the judge would have the assistance which was given by observing the way in which he gave his evidence. In reversing this order, and in rejecting the ground given by Chitty, J., that the presence in court of the witness to be examined and cross-examined was essential, Cotton, L.J., in distinguishing *Berdan* v. *Greenwood*, says: "That is most important in every case, and I can hardly see that it is more important in this case than in many other cases. This is not a case where the plaintiff is seeking to have a commission to examine himself, and where the defendants, desiring to cross-examine him, satisfy the court that the plaintiff is keeping out of the way in order to avoid cross-examination; the case is simply this, that a material witness, not being the plaintiff himself, is carrying on business in the United States and desires to be examined there and not to come over to England."

In *Fraser* v. *Nevins, Welsh and Co.* (1888), 4 T.L.R. 448, the Vice-Chancellor of the Chancery Court of the County Palatine of Lancaster had refused to make an order at the instance of the plaintiff for the examination in New Brunswick of two witnesses, residents there, being of opinion that it was a case in which it would be really essential to have the witnesses brought over to this country to be examined in the presence of the court (the nature of the action, or of the evidence to be given, is not stated). In allowing an appeal, Cotton, L.J., stated that he could not agree with the view taken by the Vice-Chancellor as to what ought to be done in the case, although he quite agreed that it was most material that the witnesses should, if possible, be examined over here, but, in his opinion, there were no means whatsoever of compelling them to come over to be examined. It appeared that one of the witnesses said that he could not come over, while the other replied that he would not come over for certain reasons which he had mentioned. That being so, and it being very essential for the plaintiff to have the evidence of those two witnesses, his application must be granted. An order was then made for their examination by the appropriate procedure. And in *Coch* v. *Allcock* (*supra*, affd. by C.A., 21 Q.B.D. 178) it was held that, where material witnesses were resident in Norway, the fact that they were in the employment or under the control of the plaintiff, who was a Norwegian and who desired to obtain their evidence, did not disentitle the plaintiff to an order for a commission. But an order was refused in *Re Boyse; Crofton* v. *Crofton* (1882), 20 Ch. D. 760, where a claim to the estate of an intestate was put forward under what Fry, J., regarded as very suspicious circumstances, and where the claimant applied for a commission to a French court to examine a witness, a

Frenchman residing in Paris, who, according to the claimant's own case, was largely interested in the success of the claim. Fry, J., being of opinion that the witness ought to be subject to the most drastic cross-examination, refused an order when it appeared that under the procedure of the French court the witness would not be cross-examined in the ordinary way.

In conclusion, it may be noted that in *Armour* v. *Walker* a commission was directed to New York to examine (*inter alia*) certain American lawyers as to the American law of limited partnership, Cotton, L.J., stating that as to American lawyers it was urged, and, as it seemed to him, correctly, that none whose opinion was worth having would come over. (See also *Western Bank of New York* v. *Koppel and Others* (1891), 8 T.L.R. 36.) But in *The M. Moxham* (1876), 1 P.D. 107, the Court of Appeal upheld the decision of Sir R. J. Phillimore, the judge of the Admiralty Division, who refused to order a commission to Spain to obtain the evidence of certain Spanish advocates, being of opinion that it would be better to have the witnesses examined in court.

M. H. L.

A Conveyancer's Diary

THE MATRIMONIAL HOME AND THE DESERTED WIFE

READERS who recall my numerous earlier articles under this heading will need no reminding that the case law on this subject (all the result of judicial activity in the past four or five years) has got into such a tangle that it is next to impossible to know at which end to begin any process of unravelling it. The latest case to be reported in this line is *Westminster Bank, Ltd.* v. *Lee* [1955] 3 W.L.R. 376, and p. 562, *ante*, a case of unusual importance because the facts were entirely straightforward and the decision is one which is not capable, or not readily capable, of explanation on special grounds.

A husband deserted his wife, leaving her to reside in what had been the matrimonial home, of which the husband was at this time the unencumbered estate owner. The husband subsequently mortgaged the house by an equitable mortgage to the plaintiff bank to secure his overdraft. The bank sought to enforce its mortgage against the husband, and also to obtain an order for possession against the wife. The decision of the court (Upjohn, J.) is well summarised in the headnote to the report of the case in the Weekly Law Reports, as follows: (1) The wife's right to remain in possession was not a mere personal right as between her husband and herself, but constituted an equity in the premises enforceable against a purchaser for value with notice, but not an equitable estate or interest enforceable against a purchaser for value without notice; but (2) the bank did not have express, nor, in the circumstances, constructive notice of the wife's equity, and was entitled to an order for possession against her.

The way in which this decision was reached is very instructive. It was, of course, argued on behalf of the plaintiff bank that the right of a deserted wife to occupation of the matrimonial home is purely personal between husband and wife, with the consequence (as Upjohn, J., put it) that an assignee of the husband (other than a trustee in bankruptcy) taking even with notice would not be affected at all by any right of the wife against the husband himself to remain in possession. The question which had to be decided was whether this submission was right, or whether the right of the deserted wife constituted an equity which bound all but purchasers for value without notice, a point which had been left open in *Bendall* v. *McWhirter* [1952] 2 Q.B. 466, where the plaintiff was the husband's trustee in bankruptcy and it was held by the Court of Appeal that he was not entitled to possession against the wife because his rights in relation to the house were no higher than those of his predecessor, the husband.

Upjohn, J., went on to review the cases. In favour of the view that the wife's right is purely personal was the decision of Roxburgh, J., in *Thompson* v. *Earthy* [1951] 2 K.B. 596, and the remarks of Jenkins, L.J., in *Bradley-Hole* v. *Cusen* [1953] 1 Q.B. 300; and in the later case of *J. B. Woodcock & Sons, Ltd.* v. *Hobbs* [1955] 1 W.L.R. 152; p. 129, *ante*, Parker, L.J., had expressed great difficulty in extending the wife's right to possession against a purchaser with or without notice, and had stated that he would require further argument before determining the point. Harman, J., in *Barclays Bank, Ltd.* v. *Bird* [1954] Ch. 274, had plainly preferred this view. But in the last three cases mentioned, Upjohn, J., observed, the remarks in question were *obiter*. Against that view were the observations of Denning, L.J., in *Bendall* v. *McWhirter* and in *Woodcock* v. *Hobbs*; and, the learned judge added, it was fair to say that, as he read the judgment of Birkett, L.J., in the latter case, he did not dissent from the views of Denning, L.J. But these observations, in the view of Upjohn, J., were again *obiter*. (The difficulty of understanding exactly what was decided in *Woodcock* v. *Hobbs* is very great: see the article in this Diary on that decision at p. 158, *ante*.)

In *Ferris* v. *Weaven* [1952] 2 All E.R. 233, Upjohn, J., went on, the *ratio decidendi* had been that a purchaser with notice is bound by the wife's right to possession, but it was not a satisfactory authority for the proposition under discussion because, as Parker, L.J., had pointed out in *Woodcock* v. *Hobbs* and Harman, J., in *Barclays Bank, Ltd.* v. *Bird*, the decision could be justified by its own special facts. (The facts were, first, that the plaintiff had acted in the plainest collusion with the husband, and, secondly, that he had not, apparently, paid any part of the purchase money and was, therefore, probably not a purchaser in the ordinary sense of that word, in this context, at all.) The last case mentioned by Upjohn, J., in his judgment in the case under consideration was *Street* v. *Denham* [1954] 1 W.L.R. 624, where Lynskey, J., against his own view "considered that he was bound to hold that a purchaser for value taking with notice was bound. It is true that in that case the plaintiff was the husband's mistress, but unlike *Ferris* v. *Weaven* the plaintiff appears to have paid the purchase money; nor was the sale obviously collusive . . . My own view [i.e., the view of Upjohn, J.] coincides closely with that of Harman, J., in *Bird's* case, namely, that a deserted wife has no more than a status of irremovability by the husband; but, so far as this court is concerned, I think I ought to follow the decision of Lynskey, J., on this point, as he carefully considered the matter in the earlier authorities, and accordingly to hold that a wife has an equity which is enforceable as against purchasers taking with notice."

The learned judge then went on to consider the nature of the wife's equity, a question which became relevant in connection with the plaintiff bank's contention that it had had no notice of the wife's position, and the further matter of notice, with the result already mentioned. With these aspects of this decision I will deal in this Diary next week. The present task is to examine the *ratio decidendi* of the decision under review, and it will be seen that, contrary to

the direct decision to this effect in *Thompson* v. *Earthy*, and contrary to the view of the learned judge himself (as well as those of several other judges), Upjohn, J., decided this part of the case as he did because he thought that he should follow *Street* v. *Denham*. Now, the latter case was certainly a direct decision, as *Thompson* v. *Earthy* had been, on the rights of a wife in relation to the matrimonial home; but despite the observations of Upjohn, J., which suggest the contrary, it does seem to have rested in one respect on a special ground.

Lynskey, J., in his judgment in *Street* v. *Denham* cited a passage from the judgment of Denning, L.J., in *Bendall* v. *McWhirter*, where the learned lord justice said: "I must say, however, that even if a successor cannot compel the husband to apply under section 17 [of the Married Women's Property Act, 1882] but has himself to bring an action at law, nevertheless I should have thought the court would have a discretion whether to order possession or not, for that is the only way in which effect can be given to the wife's right as now established. Any other view would lead to great injustice. It would mean that a guilty husband could transfer the house into the name of his new mistress, and then get her to evict his innocent lawful wife from the matrimonial home. No civilised community could tolerate such a cynical disregard of the married state. Equity demands that a successor in title should be in no better position than the husband." After citing this passage, Lynskey, J., observed that in that statement Denning, L.J., had visualised the facts of the case which had arisen in *Street* v. *Denham*. He then referred to *Ferris* v. *Weaven* as having decided that a purchaser with notice could not recover possession against the wife. In the case before him the purchaser had admittedly had notice, and in those circumstances, Lynskey, J., felt bound to hold that the wife's right to possession was capable of being enforced against the purchaser. (The learned judge's own inclination, as already mentioned, was the other way.)

It seems, therefore, that to some extent at any rate the decison in *Street* v. *Denham* was influenced by the fact that the plaintiff was the husband's mistress, and it could perhaps have been distinguished by Upjohn, J., on that ground. And it may be that a court free to review all these decisions could be persuaded to take that view. In that event the stability of *Westminster Bank, Ltd.* v. *Lee* would inevitably be somewhat shaken. But for practical purposes a litigant in this kind of litigation must, I suppose, now be advised that a court of first instance would almost certainly follow the decision in this latest case, and that if a different result is desired, he or she must be prepared to go higher. What the views of an appeal court would be, it is hard to say; but it is noticeable that of the judges who have made observations of one kind or another on this subject, all those who had practised at the equity bar have expressed a personal view adverse to the existence of any equity on the part of the wife as against a purchaser for value, with or without notice.

"A B C"

HERE AND THERE

LITERACY IN ACTION

It may or may not be a good thing for everyone to have to learn to read and write. It is an accomplishment among many others, like sailing a boat or riding a horse or lassoing a steer or playing the fiddle or making stained glass windows or charming snakes or harpooning whales. One can't do everything in this world and when all that literacy has done for a man is to enable him to read the captions in the illustrated dailies, it is arguable at least that he might lead a fuller and richer life if his learning years had been devoted to the acquisition of some other art or skill. Education is training and it is a fallacy to assume that it must of necessity imply training in one given direction. However, for better or for worse, that has been the assumption of official educators for quite a long time now. They have chosen literacy as the test. But, oddly enough (considering their passionate convictions), by that test they do not come out as well as they might have wished or we would have expected. After several generations of compulsory gratuitous education it is still a matter of reckoning up the odds in speculating whether any chance stranger in the street can write (*a*) at all or (*b*) with any degree of accomplishment beyond the first elements of the art. The prison officials and military officers whose duties bring them into contact with so many of the recent beneficiaries of the State's educational bounty have some rather depressing things to say about the extent to which those beneficiaries have benefited. One would certainly expect the country to be swarming with *literati* so that, whatever employments might be difficult to fill for want of suitable applicants, those calling for a clerkly hand should, one would have thought, be sought after by an almost embarrassing choice of candidates. But it is not so. Businessmen guard their secretaries as jealously as they guard their wives or mistresses for fear some rival more alert and keen should steal or lure them away. Solicitors are in a similar plight, so one gathered from the presidential address at the conference of The Law Society at Llandudno. Young men and women, it was said, no longer seek an interesting job with good prospects, if humble beginnings. (There is no Uriah for Mr. Wickfield.) They take the cash and let the credit go. "More and more are seeking posts, whatever they may be, where the wage packet is biggest." What they want, they want here and now.

CLERICAL ASSISTANCE

One would not have supposed that the ultimate prospects of a legal career were any worse to-day than when the future Ruler of the Queen's Navee polished up the knocker on the big front door, copied all the letters in a big round hand and went to his examination in a clean collar and a brand new suit. Can it be that the raw material from which he was fashioned is running short? The late Reginald Hine of Hitchin in his classical book "Confessions of an Uncommon Attorney" has some interesting things to say about the clerks in the first office where he worked. In particular he recalled the head cashier who spent sixty-eight and a half years with the firm from the days when, as a terrified office boy, he spilt a bottle of ink over an important document and leapt out of the window to lie in hiding for a fortnight for fear of what the "old master" would do. But formerly, life in the law had inducements besides its stability and its prospects. In that office up to early Georgian days it was the practice to provide Christiana, White Lisbon and "gold-pippin cyder" for the refreshment of the clerks. Reference to this remarkable book recalls one story it contains, a foretaste perhaps of the clerical assistance to which the legal profession may be reduced if the alarming state of affairs referred to at Llandudno becomes a permanent feature of the social structure. In this case it was a rector in Somerset who took a chance in engaging temporary clerical assistance. A tramp, asking for

work and a bit of food, had claimed that he was once clerk in a brewery office, so the rector engaged him to write to all the property owners who had not paid their tithes, promising him a commission on whatever he collected. "Done," said the tramp, "and I warrant you I'll get the money quick." Very soon along came a note from the squire: "Dear Rector, here is my cheque for £22 3s. 9d., the amount of tithe outstanding. But will you kindly tell your amanuensis that 'bloody' is spelt with one 'd' only, that 'b——r,' on the other hand, needs two 'g's,' and that 'lousy' requires no 'e' before the 'y.'"

LAMENT ON LIFE

THE lament for the vanishing solicitor's clerk, receding towards the extreme horizon in pursuit of that larger pay packet, links up with the lament with which Wallington, J., in the Vacation Court, closed the Long Vacation, joining in one single commination the flight to television, women who powder their noses too early, and "slack methods" in living and speaking. He was complaining of omissions in one of the legal documents before him, and, if he is right, the profession must face the disconcerting fact that the active potential clerk is over the hills and far away, leaving only the lethargic to moon dreamily in the office, until release stirs them into somnambulist motion towards the picture shadow world of television. If they are female then, in the judicial vision of them, they spend the last part of the working day powdering their noses and correcting defects in their complexions instead of checking errors in legal documents, so that they may be punctually ready for the five o'clock exodus. Once launched on his melancholy review, the learned judge sadly reflected on the slackness of speech which went with slackness of life so that people "turned up" instead of "attended." But, he added, "I don't suppose I shall do any more than cry in the wilderness. I don't suppose any one will take any notice." No doubt the popular reaction would be that when one is ticked off it is best to scram.

RICHARD ROE.

CORRESPONDENCE

[The views expressed by our correspondents are not necessarily those of THE SOLICITORS' JOURNAL*]*

Conveyancing Costs

Sir,—I see that your correspondents have once more started to bemoan the inadequacy of conveyancing costs. I wonder if they would care to go through a few figures with me?

Let us take a single solicitor operating a conveyancing unit employing a conveyancing clerk and a typist. He can either be running a small practice of his own which involves nothing but conveyancing, or he can be the conveyancing department of a large firm—it does not affect the argument either way. Let us suppose that they all have one month's holiday in the year and work for forty-eight weeks. Let us further suppose that they engage in five conveyances a week of suburban houses of a value between £2,000 and £3,000. If this solicitor, with the aid of two assistants, is not capable of completing one conveyance a day and still leaving himself with every afternoon to play golf then he should join the Civil Service straight away and remove himself from this discussion.

The average scale cost being £45, this solicitor will gross himself about £10,000 a year. Let us suppose that he pays his clerk £1,000 a year and his typist £500 a year. Let us further suppose that his office is in the heart of Mayfair. Two rooms, or at the most three, will house the unit and the outgoings of the practice can hardly exceed £2,500 a year. The net profit is £7,500 a year for what must be the easiest year's work which ever fell to a solicitor's lot. I have allowed nothing for the fact that he will almost certainly be on a number of building society panels and will, with something like one-half of his purchases, pick up another £10 or so for the comparatively small additional labour of preparing a mortgage on a printed form and reporting to the society on the adequacy of a title which he has already investigated on behalf of the purchaser.

You will say, of course, that no practice of the type mentioned exists, and you will be quite right. I submit, however, that such does not alter my figures. No such practice exists because no firm with a general practice can engage solely in conveyancing. Nevertheless, the figures above illustrate the extent to which the client who buys and sells his suburban house subsidises almost every other activity which goes on in a solicitor's office, and it is quite clear that he does not like it.

For the client who has much business of a miscellaneous character there may in the long run be no hardship, but, even so, the payment of £90 total costs of selling his house in one town and buying another one in the next town comes as a considerable shock to him. For the large numbers of clients who have no occasion to use a solicitor's services except when buying their houses the position must be intolerable. I feel it can only be a matter of a few years before the mounting antagonism of the general public reaches a state where no government can resist their demands for a system of conveyancing which dispenses with solicitors altogether. On the day that happens we shall be left with everything except the one thing that pays, and, with the exception of a handful of firms engaged in company and financial work, we shall all be compelled to earn our livings by some kind of productive industry. Fortunately, in the present period of full employment, those of us who are able-bodied should find no difficulty, but I doubt if we shall really like it.

Lastly, let me anticipate those solicitors who will at once protest that the house agent who finds a purchaser sends in a considerably bigger bill. Though this argument is often quoted, it seems to me absolutely irrelevant. The dentist who pulls my teeth out sends in a considerably smaller one. One very basic difference is that the client, who has quite possibly attempted to sell the house without the aid of an agent and been unsuccessful, is fully prepared to realise that the agent does a useful job. I doubt if many laymen are prepared to believe that the conveyancer is similarly useful.

E. J. WARBURTON.

London, E.C.4.

REVIEWS

Jurisprudence. By G. B. J. HUGHES, M.A., LL.B., Lecturer in Law at the University of Hull. 1955. London: Butterworth and Co. (Publishers), Ltd. £1 17s. 6d. net.

Is it inevitable, we cannot help asking, that writers on jurisprudence should in their books be for ever discussing the statements and views of other writers on jurisprudence, contradicting this conclusion, applauding that, setting Holmes against Savigny and agreeing with neither? Cannot *ratio decidendi* be explained to the reader from the author's own resources and the cases themselves without entering into the merits and demerits of Goodhart's essay on the same theme? The author of a textbook for university students has, however, a good excuse for presenting his work in this way, for that seems to be the modern idea at the universities of the teaching of jurisprudence, a kind of background course in the theoretical literature of law. It is high time the subject was brought nearer to earth, or sent down from the curriculum.

Mr. Hughes expresses, indeed, some individual views on the teaching of jurisprudence. It should not, he says, be reduced to "a somewhat highbrow exposition of the elements of English law." He approaches his subject "from the contemporary standpoint of the realist jurists," and sets out to treat at fairly equal length the three tutorial divisions of the matter, Legal Theory, Classification and Sources, and Legal Concepts. The work is most thoroughly done, and if the student can overcome the feeling (for which, as we said above, we do not blame this

author more than any other) of being inveigled into a glorious and sometimes inconclusive wrangle between greybeard professors, he will find plenty to hold his interest and to sharpen his appreciation of the nature and incidence of the elements and compounds of legal science.

We found the introduction rather unpromising. Possibly we had been spoiled for it by the recent airy discussions in *The Times* correspondence columns on how to make the dockers understand the economists. No doubt it is important to keep words in their places as our servants lest they tyrannise us into the formulation of distorted ideas. For ourselves, however, we would recommend the constant study of reported judgments as an excellent discipline to that end. Mr. Hughes gives his students a grim foretaste of the horrors of terminological divergency among writers and between theorists and judges, tending to overstate the difficulty, we thought. He succeeds in showing that "law" is no easier to define than an elephant, but we adhere to the view that it is just as easily recognised.

Once the first part of the book is under weigh, the author gets down to a thorough examination of the various converging lines of juridical study, the analytical, historical, sociological and realist. These are not mutually exclusive, and in spite of his commendable espousal of the realist approach (how the law in fact works), Mr. Hughes is clearly very much of a sociologist too. His last two chapters, grouped together under the heading "Law and Society," make up an informed and interesting study of industrial relations in the fields of master and servant and trade association.

If, then, readers of this review disagree with the first paragraph of it they will undoubtedly delight in this book. Should anyone be found to agree with us there is still much profit in it, especially, but by no means exclusively, for academic students.

The Concise Law of Housing. By W. A. WEST, LL.B. 1955. London: The Estates Gazette, Ltd. £1 12s. 6d. net.

This is a capable and orderly exposition of the legislation on housing arranged in narrative form and following the section-order of the "principal Act," the Housing Act, 1936. It is more a student's than a practitioner's book, as there is nothing in it that will not be found in the standard text-books, and the equipment of table of statutes and alphabetical index is not full enough for a practitioner, though adequate (and accurate) for the present work.

As the learned author has cast much of his material in the form of a paraphrase of the statutory provisions, working in where appropriate (in an interesting manner) the facts and decisions of some of the decided cases, it was not necessary to include a print of any of the statutes, and this would undoubtedly have over-weighted the book for the student. It seems a pity, in a student's book especially, as they must at an early age learn the relative importance of decisions of different courts, that at least two "unreported" decisions and one Scots decision are cited without any indication being given in the text of their standing as authorities.

As was apparently the intention, the book is written from the angle of the private practitioner, not from that of one engaged in local authority housing, and therefore such matters as housing finance and management are touched on only comparatively briefly. The book, however, provides a very readable introduction to the law of a complicated subject and, although we should have thought a "complete statement of the law of housing" could not possibly be achieved in 200 pages, this is a very workmanlike and "concise" review of the main subject-matter.

A Handbook of the Law Relating to Landlord and Tenant. By the late BENAIAH W. ADKIN. Fourteenth Edition by RAYMOND WALTON, Barrister-at-Law. 1955. London: The Estates Gazette, Ltd. £2 7s. 6d. net.

The main object of this book is to help future (or intending) surveyors, estate agents, land agents, etc., get through their examinations; but the editor's hope, that it may now serve as an introduction to the law of landlord and tenant for an even wider class of reader, is more than fulfilled; the contents are far more than a mere "introduction." We have, indeed, seldom come across a work giving so much information in so little space. The work follows, in the main, what might be called the usual pattern, dealing with capacity, with the contents of leases, with rent and distress for rent, alienation, determination, etc., in separate chapters; but repairs are given a chapter to themselves and the last three chapters are devoted to dwelling-houses, business premises and agricultural holdings respectively. The changes effected by the Housing Repairs and Rents Act and the Landlord and Tenant Act of last year are, of course, discussed and explained. The treatment of the law relating to business premises is, however, open to some criticism; too much is said about the Landlord and Tenant Act, 1927, Pt. I, and too little about the Landlord and Tenant Act, 1954, Pt. II; chap. XIV reads almost as if the latter statute had made just a few minor amendments to the former, and it is noticeable that Sched. VII to the 1954 Act (repeal of enactments) has been omitted from the text supplied in App. I (statutes). One may hope that this defect in an otherwise thoroughly realistic text-book may be remedied on a future occasion.

De-Rating and Rating Appeals, Volume 25—1954. Edited by F. A. AMIES, B.A., F.C.I.S., F.R.V.A., of Gray's Inn and the North Eastern Circuit, Barrister-at-Law. 1955. London: The Solicitors' Law Stationery Society, Ltd. £2 2s. net.

Volume 25 of "De-Rating and Rating Appeals" contains reports of forty-seven cases, the number being less than in the previous year, but their total length more. Thirty-five of the cases were heard in the Lands Tribunal only, one was heard in the tribunal and the Court of Appeal, and seven were heard in the superior courts only. There are three Scottish appeals and one Northern Ireland appeal. The arrangement has been improved by the addition of the judge's name at the top of each left-hand page on which his judgment appears, an aid to orientation in these detailed and lengthy reports. The series is virtually indispensable to all who have dealings with rating law.

TALKING "SHOP"

October, 1955.

MONDAY, 3RD

It is arguable that the slapdash methods of house-purchase conveyancing which began during the last war, and have been "carried over" into post-war years, are not wholly commendable. If I remember rightly, the old system worked out in practice something like this. The vendor's solicitor drafted a lengthy agreement, which was occasionally typed on foolscap, but more often on draft or even sometimes on brief, and meanwhile, as *Re Forsey and Hollebone* was yet in the womb of time, there was nothing for the purchaser's solicitor to do. When the draft arrived it usually contained, in type, many of the provisions that nobody bothers to read nowadays because they have been relegated to printed conditions. The draft passed to and fro in a leisurely fashion, and when it was finally agreed—which might be at the red, green, mauve, blue, brown or yellow stage—the solicitors would make "an appointment to exchange." The purchaser's solicitor would attend at the office of the vendor's solicitor, and there they would check the two parts. I dimly remember that *A* read *B's* part, whilst *B* checked *A's*, but how this device effectively precluded chicanery escapes me at this distance of time. At all events, once satisfied, *A* handed over the deposit, sometimes taking a separate receipt, the two parts were dated, and the parties separated for the next round.

Some while after this, the vendor's solicitor would "get down to" the abstract and a major operation it often was, but eventually it would be ready, all freshly typed and with clean copies of the plans attached. The purchaser's solicitor, who had been eagerly awaiting this event, then "perused" the title with loving care, scrawling over the brief sheets

and writing notes in the margin of a tendentious character. The deeds were then examined against the abstract. If I am right, the junior clerk read and the senior was read to, making important notes and corrections as his subordinate droned away. Then each deed was marked "produced and examined at the offices of" Messrs. So-and-So.

After this stage there was usually a pause for some argument about the production of missing documents—where they were and who was to find them and pay the production fee—which served to pass the time until requisitions on title were due or overdue. Every sort of requisition was raised, no holds were barred, and, of course, there were further requisitions, additional requisitions and so forth. Finally the draft conveyance went through a process similar to that of the draft agreement, but with the purchaser's solicitor bowling. And last, but not least, enormous pains were taken before "completion" to be sure that nothing was forgotten (so much so, that the quaint practice of leaving the banker's draft behind was, I believe, more prevalent in those days than it is now—there was so much else to remember).

Much of this, I dare say, was open to criticism, and when carried to absurd lengths—as it not infrequently was—the system was laughable and even preposterous. But it was thorough. Time-wasting perhaps, but certainly thorough.

TUESDAY, 4TH

And now what happens? Something like this. The vendor's solicitor dictates a draft consisting of a few clauses on a printed form. The purchaser's solicitor sends him preliminary inquiries, also on a printed form, and often without troubling to strike out those that are unsuitable. At the same time he dispatches inquiries to the local authorities and possibly makes a "search" at the Land Registry: all printed forms again. Contracts are exchanged through the post. (I should like to think that the vendor's part is invariably checked against the draft by the purchaser's solicitor, and *vice versa*, but is it?) The abstract is sent "on loan" (because the vendor's solicitor must have it back to answer any requisitions) and it usually turns out to be a faded and soiled document with tattered plans, which goes back well before the root of title; it was last examined by an unknown firm. "Requisitions" consist of an inquiry "whether, if the preliminary inquiries on the contract were repeated, the answers would be the same." The vendor's solicitor, who recognises a kindred spirit, thankfully answers "yes." Examination of title deeds is left until completion, and are they always examined then? I suspect not. In any case, by that time, as often as not, the purchaser is already in possession and it is much too late to raise anything but a fundamental objection. The solicitors concerned tie up any loose ends—or purport to do so—by exchanging "undertakings."

There is an element of caricature in this, nor are all these features present in every transaction, but can it be denied that something very like it goes on in most offices most of the time?

WEDNESDAY, 5TH

I suspect that I have done less than justice to our contemporary conveyancers, who do get on with the job and do not waste time looking for trouble. (It is, of course, possible to take the naïve view that the whole business of deducing and investigating title is a vast mumbo-jumbo; I hardly think that any conveyancer of experience would subscribe to it.) It is also an improvement that solicitors trust each other more than they did, and are more ready to deal with each other through the post, and to accept undertakings and so forth. I hope we shall never go back to the old system in its entirety; happily, there is little risk of it. But there were certain features of the old system that were not so bad and compare favourably with corresponding features of the new. For example, I doubt if there is any good reason for failing to supply a proper clean abstract starting with the contracted root of title; the title should be properly investigated *de novo* and not taken on trust; the deeds, I believe, should be examined well before completion; and undertakings, which (more often than not) are merely a confession of failure to be ready in time, should be the exception and not the rule.

It will be said that these are counsels of perfection—always so much less palatable than counsels of imperfection! But sad stories of staff shortage and tyrannies of client and calendar weigh for little against the fundamental question—do we thoroughly earn the fee? Not so long ago the rate for the job was the focus of attention. No less important is the job for the rate.

THURSDAY, 6TH

One curious result of the new system is the growth of seemingly fallacious notions about the nature of an abstract. During the war *X & Co.* made sundry loans on mortgage and at first kept the title deeds and *their* abstract together. (By *their* abstract I mean the abstract of the borrower's title, supplied to *X & Co.'s* solicitors for the purpose of the loan.) But from time to time the borrowers would wish to inform themselves about the ownership of boundary walls and other matters, so that the abstracts (*X & Co.'s* abstracts) were taken from the bundles and left with the solicitors, who were thus able to answer most questions expeditiously and without reference to the original deeds.

In due course a bomb destroyed the solicitors' offices and with them *X & Co.'s* abstracts. The original title deeds, being still with *X & Co.*, survived, and so did any examined abstracts *not* of the genus "*X & Co.'s.*"

Out of all this arose a great pother, with bitter complaints from borrowers and their solicitors that proper care had not been taken of "their" abstracts. In truth, the fault lay with the Luftwaffe, but this is not the point of the story. The point is that the destroyed abstracts were not the borrowers' at all but the lenders'; and if the borrowers' solicitors had followed the excellent pre-war practice of supplying new abstracts for loans, they would have found their own original abstracts still safely tied up with the title deeds. Of course, nowadays the practice has become so loose that abstracts are passed from one hand to another until nobody knows whose they are.

As to undertakings, the casual way in which these are given never ceases to astonish me. It is common practice to undertake that the purchaser will execute a conveyance or assignment after completion. How can anybody be sure of that? He may be dead, lunatic or merely cantankerous and uncoöperative. Only six months ago a client refused to execute a document which he had seen and approved in draft, alleging that it failed to take account of some important feature of his building programme of which his solicitors had not been informed. As it happens, no undertaking had been given in that case, but had his solicitors given one it would have been just a question of time before somebody reminded them of the Council's views on this subject published in the *Law Society's Gazette* for March, 1951. "Where . . . a solicitor has given an undertaking expressed to be on behalf

of a client, which the solicitor is clearly not personally able to implement, the Council believe that he is under a duty to persuade his client to implement that undertaking." In other words, solicitors who are rash enough to give undertakings in such a form must accept the consequences. And a disagreeable business it is likely to be, with a disgruntled client (or ex-client) on the one side and an equally disgruntled firm of solicitors on the other.

Then there is the monetary undertaking, which does not give rise to the same difficulties. But why should solicitors accept personal responsibility for meeting Schedule A tax, rates and I know not what? True, if personal responsibility is to be disclaimed, it must be in the clearest terms and such expressions as "on behalf of my client" do not, in the opinion of the Council, suffice. (See the same statement published in March, 1951.) But it may properly be inferred that there is no objection in principle to qualified undertakings of that character; and secondly that, if an undertaking is to be so qualified as to preclude liability on the part of the solicitor, the client might just as well (and perhaps better) give it himself. Yet Messrs. *Z & Co.*, when offered an undertaking by my client to meet Schedule A tax, personally signed by him, strenuously object and say that they must have an undertaking from my firm, who are receiving the purchase-money. I sympathise with their view that solicitors tend to be more static than clients, but they do not get it.

"ESCROW."

SURVEY OF THE WEEK

STATUTORY INSTRUMENTS

Fire Services (Appointments and Promotion) Regulations, 1955. (S.I. 1955 No. 1460.)

Import Duties (Exemptions) (No. 8) Order, 1955. (S.I. 1955 No. 1459.)

Import Duties (Exemptions) (No. 9) Order, 1955. (S.I. 1955 No. 1473.)

London–Folkestone–Dover Trunk Road (Priory Place and Worthington Street, Dover) Order, 1955. (S.I. 1955 No. 1454.)

Macclesfield (Water Charges) Order, 1955. (S.I. 1955 No. 1474.)

Metropolitan Water Board (Hoddesdon) Order, 1955. (S.I. 1955 No. 1475.) 6d.

Milk Marketing Board (Modification of Functions) (Revocation) Order, 1955. (S.I. 1955 No. 1477.)

National Insurance (Modification of Trustee Savings Banks Pensions) Regulations, 1955. (S.I. 1955 No. 1472.)

Norman Cross–Grimsby Trunk Road (Spilsby Diversion) Order, 1955. (S.I. 1955 No. 1465.)

North of Scotland Hydro-Electric Board (Constructional Scheme No. 31) Confirmation Order, 1955. (S.I. 1955 No. 1469 (S.134).)

Official Secrets (Prohibited Place) Order, 1955. (S.I. 1955 No. 1497 (S.136).)

Retention of Cables, Mains and Pipe under Highways (Lincolnshire—Parts of Lindsey) (No. 5) Order, 1955. (S.I. 1955 No. 1455.)

Retention of Cables, Mains and Pipe under Highways (Somersetshire) (No. 4) Order, 1955. (S.I. 1955 No. 1457.)

Retention of Railway across Highway (Nottinghamshire) (No. 1) Order, 1955. (S.I. 1955 No. 1456.)

Stamped or Pressed Metal-Wares Wages Council (Great Britain) Wages Regulation Order, 1955. (S.I. 1955 No. 1478.) 8d.

Stevenage Development Corporation Water Order, 1955. (S.I. 1955 No. 1461.)

Stopping up of Highways (Bristol) (No. 6) Order, 1955. (S.I. 1955 No. 1482.)

Stopping up of Highways (Kent) (No. 17) Order, 1955. (S.I. 1955 No. 1486.)

Stopping up of Highways (Liverpool) (No. 1) Order, 1955. (S.I. 1955 No. 1483.)

Stopping up of Highways (London) (No. 23) Order, 1955. (S.I. 1955 No. 1487.)

Stopping up of Highways (London) (No. 43) Order, 1955. (S.I. 1955 No. 1484.)

Stopping up of Highways (Middlesex) (No. 8) Order, 1955. (S.I. 1955 No. 1485.)

Stopping up of Highways (Somerset) (No. 3) Order, 1955. (S.I. 1955 No. 1488.)

Stopping up of Highways (Warwickshire) (No. 4) Order, 1955. (S.I. 1955 No. 1481.)

Stopping up of Highways (Worcestershire) (No. 6) Order, 1955. (S.I. 1955 No. 1464.)

Water Byelaws (Extension of Operation) Order, 1955. (S.I. 1955 No. 1468.)

Welwyn Garden City Water Order, 1955. (S.I. 1955 No. 1462.)

[Any of the above may be obtained from the Government Sales Department, The Solicitors' Law Stationery Society, Ltd., 21 Red Lion Street, W.C.1. The price in each case, unless otherwise stated, is 4d. post free.]

POINTS IN PRACTICE

Assent by Sole Personal Representative to Himself—EFFECT

Q. We are acting on the purchase of a freehold property, and one of the documents in the vendor's title is an assent of 1949 by a sole personal representative by virtue of which she assented "to the vesting in myself of all that, etc." In view of the wording of s. 36 (4) of the Administration of Estates Act, 1925, is this assent effectual to pass a legal estate?

A. The opinion generally held is that the effect of such an assent is to show that the legal estate is thereafter held by the executing party beneficially and no longer as personal representative. If an endorsement has been made on the probate a purchaser must accept title from that party selling beneficially, and the purchaser has the protection of the Administration of Estates Act, 1925, s. 36 (7). It is probably better in such a case not to refer to "passing" of the legal estate as it is often argued that the estate does not "pass" (and there is no absolute necessity for a *written* assent) where transferor and transferee are the same person. See, for instance, the discussion in Emmet on Title, 13th ed., vol. II, p. 1139.

Evidence—DRIVING UNDER INFLUENCE—COPIES OF DOCTOR'S REPORT

Q. We are acting at the moment for two clients charged with being under the influence of drink whilst driving a motor car, both of whom were examined by the police doctor and did not have their own doctor present. In the one case, we wrote and were supplied with the doctor's report; in the other case, the Chief Constable refused to supply such a copy. Having regard to the judgment of Humphreys, J., in *R. v. Nowell* [1948] 1 All E.R. 794, it is our contention that the defence should have the right to a copy of the doctor's report in these circumstances. The last few lines of the judgment read as follows: "Our view is that the evidence of a doctor, whether he be a police surgeon or anyone else, should be accepted, unless the doctor himself shows that it ought not to be, as the evidence of a professional man giving independent evidence with no other desire than to assist the court." A further point is that, should the defendant

Questions, which can only be accepted from practising solicitors who are subscribers either directly or through a newsagent, should be addressed to the "Points in Practice" Department, The Solicitors' Journal, 21 Red Lion Street, London, W.C.1.

They should be **brief, typewritten in duplicate,** and accompanied by the name and address of the sender **on a separate sheet,** together with a **stamped addressed envelope.** Responsibility cannot be accepted for the return of documents submitted, and no undertaking can be given to reply by any particular date or at all.

elect to be tried at the quarter sessions, then defending counsel would have a copy of the medical report as an exhibit to the depositions or as part of the doctor's evidence. It seems inequitable that a person unable to afford the luxury of trial at the quarter sessions should be denied this advantage.

A. The prosecution are under no obligation to supply a copy of the doctor's report (*R.* v. *Bryant* (1946), 110 J.P. 267). The headnote reads: "Where the prosecution have taken a statement from a person who can give material evidence and do not call that person as a witness, their duty is limited to making such person available as a witness for the defence, and they are not under a further duty to hand to the defence a copy of the statement which they have taken." That case, it is true, is concerned with witnesses who are not called, but we think that it applies *a fortiori* to witnesses who are called. It is, in our experience, quite unusual to supply copies of witnesses' statements to the other side and it is immaterial that a witness is a doctor. All that *R.* v. *Nowell* [1948] 1 All E.R. 794 decided was that a doctor should be regarded as an independent, i.e., unbiased witness, and nothing was said about supplying a copy of his evidence to the other side. Unless the defendant has been committed for trial, however, the defence are quite entitled to interview the doctor themselves prior to the hearing and the police have no "property" in him (see the opinion of the Director of Public Prosecutions cited at 98 SOL. J. 549).

NOTES AND NEWS

Honours and Appointments

Mr. RONALD WILLIAM FRANCIS PAGAN has been appointed Official Receiver for the Bankruptcy District of the County Courts of Canterbury, Rochester and Maidstone.

The following appointments are announced in the Colonial Legal Service: Mr. C. H. BUTTERFIELD, Solicitor-General, Singapore, to be Attorney-General, Singapore; Mr. C. L. REGAN, Senior Magistrate, Fiji, to be Resident Magistrate, Kenya; Mr. J. BODILLY to be Crown Counsel, Hong Kong; Mr. R. J. HOLMES to be Crown Counsel, Aden; Mr. G. C. N. W. PRATT to be Assistant Attorney-General, North Borneo.

Personal Notes

Mr. John Reid Newton, a prosecuting solicitor for Kent County Council, was married on 24th September to Miss Faith Pamela Sanderson, of Sheffield.

Mr. John M. Worthington, a registrar of the Lancashire Chancery Court for twenty-nine years, has resigned.

Miscellaneous

MEMORIAL TO LORD HALSBURY

On 30th September a memorial to Lord Halsbury, who died in 1921, was dedicated in the parish church of Chittlehampton, Devon. Lord Halsbury was Lord Chancellor for sixteen years, but he is equally famous to-day as the first editor of "The Laws of England." The memorial has taken the form of the restoration of the family chapel in the church, in which a new window has been inserted. About £900 has been subscribed by members of the legal profession, relatives and the publishers of Halsbury's Laws of England, sufficient to carry out all the work except paving the floor and colouring the roof and monument. Fourteen generations are commemorated in the church from the fifteenth to the nineteenth centuries. The memorial inscription was unveiled by the present and third Lord Halsbury.

Six Sunday night lectures on "Legislatures" in the B.B.C.'s Third Programme by K. C. Wheare, Gladstone Professor of Government and Public Administration at Oxford University, began on 2nd October.

As from 1st October, The Law Society No. 5 (South Wales) Legal Aid Area Headquarters are at 1 St. Andrew's Crescent, Cardiff. Telephone No.: Cardiff 32896–7 (unchanged).

The 1956 *Accountant* awards will be made in relation to the form and contents of reports and accounts laid before companies in general meeting within the year ending 31st December, 1955. Particular consideration will be given in the making of an award to a company submitting accounts which do not involve the complexity of those of a large group. Companies are invited to send, for consideration, copies of their reports and accounts (with any chairman's statement circulated to shareholders) to: The Secretary, The *Accountant* Annual Awards, 4 Drapers' Gardens, London, E.C.2. The closing date for the receipt of entries is 31st January, 1956.

THE SOLICITORS' LAW STATIONERY SOCIETY, LTD.

INTERIM DIVIDEND

The Directors of The Solicitors' Law Stationery Society, Ltd., announce the payment on the 25th October, 1955, of an interim dividend of 4 per cent., less income tax, on the capital increased by a one for two scrip issue (against 5 per cent. on former capital, equivalent to 3⅓ per cent. on present capital). The increased interim distribution must not be regarded as an indication that the total distribution for the year will be higher.

SOCIETIES

The UNION SOCIETY OF LONDON announces the following subjects for debate in October, 1955, in the Common Room, Gray's Inn, at 8 p.m.: Wednesday, 12th October, "That the working-man is cutting his own throat." Wednesday, 19th October, "That this House supports the Government's handling of Cyprus." Wednesday, 26th October, "That sport in England is going to the dogs."

OBITUARY

MR. W. D. DAVIES

Mr. William Denison Davies, M.A., solicitor, of Darwen, died on 19th September, aged 35. He was admitted in 1949.

MR. L. V. C. HOMER

Mr. Lionel Victor Cyril Homer, B.A., LL.B., a blind solicitor, of Bournemouth, has died, aged 73. He was admitted in 1909. He was a founder-member of the Blind Aid Society in 1912, and had been secretary of the Bournemouth Blind Aid Society since 1930.

MR. C. E. ROBERTS

Mr. Charles Esmond Roberts, solicitor, of London, died on 28th September, aged 49. He was admitted in 1932.

MR. H. H. VOWLES

Mr. Henry Hayes Vowles, of Highnam, Gloucester, died on 17th September, aged 77. He was admitted in 1900 and was Clerk to the Gloucester County Magistrates from 1926 until 1950.

MR. C. S. WALKER

Mr. Charles Selborne Walker, a former Halifax solicitor, has died, aged 89. He was admitted in 1899, and was a past president of the Halifax Law Society.

MR. J. O. WALKER

Mr. Joseph Ownsworth Walker, solicitor, of Barnsley, died on 19th September, aged 81. He was admitted in 1913.

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